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No. 02-348

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Respondents,

and

AUDUBON SOCIETY OF PORTLAND,
OREGON TROUT, INC., PACIFIC
COAST FEDERATION OF FISHERIES, and
INSTITUTE FOR FISHERIES RESOURCES,
Intervenors-below.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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A. The State Imposed a Servitude Upon Petitioners' Land for a Public Purpose.

Both elements of a physical taking are present in this case. Through the subject regulation the State of Oregon used Petitioners' timber for the public purpose of preserving a wildlife habitat for Northern Spotted Owls and restricted Petitioners' right to exclude the owls from their land. *Tahoe-Sierra Preservation Council v. Tahoe Regional Plan*

Agency, 122 S. Ct. 1465, 1479 n. 19 (2002). The State's factual arguments to the contrary are incorrect.

1. The Owls Were Authorized to Invade and Occupy Petitioners' Property.

Where the government authorizes a physical occupation of private land, there is a *per se* taking that requires just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982). The State argues that a physical taking did not occur here because the owls' nest was located on the property of an adjacent landowner. This is an irrelevant red herring because the subject regulation authorized the owls to occupy an entire protected *habitat*, which included 40 acres of Petitioners' timberland. Oregon Administrative Rule 629-665-0210 states in part:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (*Strix occidentalis caurina*), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A *70 acre area of suitable spotted owl habitat* encompassing the nest site, to be *maintained as suitable spotted owl habitat*;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.
>
> (2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an

activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) *For the purposes of this rule, suitable spotted owl habitat means and includes*:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); *a multi-layered, multi-species canopy dominated by large overstory trees* (greater than 30 inches in diameter at breast height); *a high incidence of large trees with various deformities* (*e.g.*, large cavities, broken tops, and other evidence of decadence); *numerous large snags; large accumulations of fallen trees and other woody debris on the ground*; and *sufficient open space below the canopy for owls to fly*; or

(B) In the absence of habitat which exhibits all the characteristics listed above, *the available forested habitat which comes closest to approximating the listed conditions.*

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(Pet. App. G; 22a-23a (emphasis added).)

Pursuant to this regulation, in 1994 the Oregon Department of Forestry ("ODF") designated 40 acres of the Petitioners' timber as part of a protected 70 acre area "to be maintained as suitable spotted owl *habitat*." (*Id.* (emphasis added).) The regulation logically recognizes that spotted owls, like all birds, do not dwell solely within their nesting site. They must

roam and search for prey within a larger "habitat."[1] The regulation requires that all acreage within the habitat be protected for the public purpose of providing the owls with the timberland they need to occupy on a regular basis in order to survive and breed.[2] The State's contention that it authorized no physical occupation of Petitioners' land is simply wrong.

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[1] The principal definition of "habitat" necessarily includes an area of physical occupation:

> 1. a. *Nat. Hist.* The locality in which a plant or animal naturally grows or lives; habitation. Sometimes applied to the *geographical area* over which it extends, or the special locality to which it is confined; sometimes restricted to the particular *station* or spot in which a specimen is found; but chiefly used to indicate the kind of locality, as the sea-shore, rocky cliffs, chalk hills, or the like.

The Oxford English Dictionary (2d ed. 1989) at 995 (emphasis in original).

The term "habitation" is principally defined as:

> 1. The action of dwelling in or inhabiting as a place of residence; *occupancy* by inhabitants.

Id. (emphasis added). *See also* 16 U.S.C.A. § 1532(5)(A) (defining "critical habitat" under the Endangered Species Act ("ESA") as including "the specific areas within the geographical area occupied by the species . . ."); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding Secretary of the Interior's finding that habitat modification or degradation falls within meaning of "take" under ESA).

[2] The State's contention that the owls must permanently and exclusively occupy Petitioners' land before there can be a physical taking (*see* Response at 7-8) is contrary to this Court's physical takings jurisprudence. *See, e.g., U.S. v. Causby*, 328 U.S. 256 (1946) (temporary incursions of airspace over private land can give rise to a physical taking); *Tahoe-Sierra*, 122 S. Ct. at 1478-79 (every physical occupation authorized by government for public use is compensable, "even though that use is temporary.").

2. The State Restricted Petitioners' Right to Exclude the Owls from their Property.

Restriction on the right to exclude a government authorized intruder and forced acquiescence to the occupation is the hallmark of a physical taking. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). The State erroneously argues that Petitioners were not barred from excluding the owls from their property because the nest was located on adjacent land.

First, as demonstrated above, the location of the nesting site itself was not the only place where the government authorized the owls to enjoy unrestricted, protected occupation. The entire "habitat" defines the area of authorized occupation. Ore. Admin. Rule 629-665-0210(1)(a), (3)(a)(A)-(B). So the State's attempt to argue that there can be no restriction on the right to exclude where there is no authorized intruder fails here because it is premised upon an incorrect view of the undisputed facts. The owls were authorized to occupy Petitioners' land.

Second, even though the nest was located elsewhere, Petitioners were prevented from doing anything *on their property* that might cause the owls to leave the nesting site, and it is undisputed that this included any harvesting of the subject timber. Ore. Admin. Rule 629-665-0210(1)(b) (Petitioners could engage in no "activities" that might "cause owls to flush from the nesting site"). The State's Response at pages 2-3 admits that Petitioners were denied the right to harvest because the State determined that doing so would violate the subject regulation.

Third, it is difficult to take seriously the State's rather bizarre suggestion that Petitioners were free to use any method other than deforestation to exclude the owls from their timber, such as erecting fences or installing sound devices.[3] (*See* Response at 2.) The entire point of the subject

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[3] The State did not raise this argument below.

regulation is to make a full 70-acres of protected timberland available to the owls so they can seek prey and breed. The ODF denied Petitioners the right to harvest because it determined that eliminating Petitioners' 40 acre parcel of the habitat could cause the owls to leave the nesting site. There can be no doubt that the ODF would have construed the subject regulation to prohibit Petitioners from engaging in *any* activity designed to make their 40 acres of timber entirely unavailable to the owls. The regulation on its face prohibits such conduct if it is part of any "operation." Ore. Admin. Rule 629-665-0210(1). If Petitioners had attempted to protect their timber for eventual logging by excluding the owls through sound devices or any other means, the State would have prohibited them from doing so under the subject regulation and other pertinent statutes and regulations.[4]

3. The State Used Petitioners' Timber for a Public Purpose.

Contrary to the State's suggestion, Petitioners have not overstated the effect of the subject regulation, which resulted in a temporary physical taking for a public purpose.

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[4] *See e.g.*, Ore. Admin. Rule 629-665-0020, which empowers the State Forester to take action to prohibit any operation or activity which threatens the fundamental goal of protecting wildlife resource sites, as set forth in Ore. Admin. Rule 629-665-0010:

> (1) The goal of resource site protection is to ensure that forest practices do not lead to resource site destruction, abandonment or reduced productivity.
>
> (2) A resource site shall receive protection when the State Forester determines:
>
> (a) It is an active resource site; and
>
> (b) Proposed forest practices conflict with the resource site.
>
> * * * *

Petitioners were prevented from harvesting their timber from 1994, when the ODF designated 40 acres of the Petitioners' timber as a part of a protected 70-acre spotted owl habitat, until 2001–two years after the physical takings claim before the Court was dismissed by the trial court. Under Oregon law, the Petitioners had to have the approval of the ODF in order to harvest their timber. Ore. Admin. Rule 629-665-0210(1). Petitioners submitted a written plan to harvest, which the ODF denied.

The ODF's ban on harvesting was permanent for as long as the owls chose to remain at the nesting site. Petitioners could not log after the nesting season. In the nature of a leasehold acquired by eminent domain, the State occupied and appropriated the only commercial value of the timberland for a definable period. The State plainly used the timber for a public purpose, *i.e.*, to provide a "suitable habitat" that could be "occupied by an adult pair of spotted owls, capable of breeding." Ore. Admin. Rule 629-665-0210 (1)-(2). This a *per se* physical taking.

Petitioners' ability to engage in non-commercially profitable activities on the property during the ban on harvesting is a fact relevant only within a regulatory taking analysis. Because this case involves a *per se* physical taking, however, the State is incorrect to suggest that Petitioners bear the burden of proving they could make no use of their property whatsoever, or that the government authorized a physical occupation which entirely excluded Petitioners from access to their land. (*See* Response at 7-8.) Like the plaintiff in *Loretto*, Petitioners have a right to compensation for the physical occupation of their property, notwithstanding any ability they may have had to control or use the land apart from logging.

B. Lower Court Decisions Are in Conflict on This Issue.

The State does not attempt to reconcile this Court's physical taking jurisprudence with the Oregon Court of Appeals' decision in *Boise Cascade Corporation v. Oregon Board of Forestry*, 991 P.2d. 563 (1999). The Oregon court's reasoning for rejecting a physical taking claim in *Boise*, based upon the State not having "control" over the owls, is contrary to this Court's physical taking jurisprudence stated in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto*, 458 U.S. at 424; *Yee*, 503 U.S. at 522, and most recently *Tahoe-Sierra*, 122 S. Ct. at 1479 n. 19. *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 332-335 (1997).

Control over Petitioners' timber and not the owls is the issue. Petitioners could not use or dispose of their timber unless it could be harvested. No one was going to buy standing timber that could not be logged, nor was anyone going to purchase logs that could not be cut and delivered. Because the State used the timber to protect and preserve a spotted owl habitat, it exerted complete economic control over that property.

The State argues that because this Court denied certiorari in *Boise* it should also deny certiorari in this case. The fact that the Federal Circuit has recently followed the Oregon court's erroneous reasoning in *Boise Cascade v. U.S.*, 296 F. 3d. 1339 (Fed. Cir. 2002) is even more reason that the Court should grant certiorari in this case. The Federal Circuit *Boise* case is also now before the Court as it filed a petition for certiorari on November 27, 2002. The erroneous reasoning of the Oregon court should be overruled before any other court follows it.

The State's attempt to distinguish lower case law as outdated merely begs the question. Some of the cases consistent with Petitioners' position do pre-date *Loretto*. However, the State dismisses them as irrelevant based upon an incorrect assumption that *Loretto* supports subsequent decisions–such as that of the Oregon court here and the Federal Circuit's *Boise* decision–which hold that no physical taking analysis is applicable within the wildlife occupation context. That is the very conclusion that the Petition in this case challenges. *Loretto* supports the finding that a physical taking occured here.

C. Reference to Petitioners Regulatory Taking Claim Merely Accentuates the Need for Resolution of the Physical Taking Issue.

The State has included in its response as an appendix Petitioners' Second Amended Complaint in the pending case, which alleges various regulatory takings theories, that was refiled after they had sought, and were denied an incidental take permit by the U.S. Fish and Wildlife Service. This was done in an attempt to come within the "discretion" exception provided in Ore. Admin. Rule 629-665-0210(5) in order to satisfy the regulatory taking ripeness requirement. (Pet. App. G; 23a.) *See Boise*, 991 P.2d. at 572-73. The substantial barriers Petitioners face in trying to recover under a regulatory takings claim theory are shown by the State's Answer to that Complaint, reproduced as an Appendix to this Reply, which includes Seventeen Affirmative Defenses that can only lead to further appeals.

The Petitioners were entitled to have their claim tried on a physical taking theory in 1998, and not face the uncertainties of a trial in 2003 based upon a regulatory taking approach. The State's attempt in this case to push Petitioners into the regulatory taking context alone merely reinforces the granting of the Petition. It is important for this Court to grant review and provide lower courts with

guidance as to which branch of this Court's takings jurisprudence applies when the government has authorized the physical occupation of private land by wildlife and has imposed a servitude upon the land for the public purpose of preserving it as a wildlife habitat.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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